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No. 90-68

In The

Supreme Court of the United States

October Term, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

JULIANA DROUS
(Appointed by this Court)
214 Duboce Avenue
San Francisco, CA 94103
(415) 863-3580

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether, despite the "plain statement" rule of *Harris v. Reed*, 489 U.S. 255 (1989), a federal court must undertake a comprehensive review of state law and prior state court proceedings in an attempt to divine the California Supreme Court's reasons for a pro forma denial without comment of a petition for writ of habeas corpus.

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OPINION BELOW

In addition to the decisions listed by petitioner, the judgment of the California Supreme Court summarily denying Mr. Nunnemaker's petition for writ of habeas corpus should be included. This order appears in the Joint Appendix at page 114.

STATEMENT OF THE CASE

After respondent, Owen Duane Nunnemaker, was arrested and in custody, the district attorney sent a psychiatrist to interview him. After asking Mr. Nunnemaker his age and occupation, the psychiatrist told Mr. Nunnemaker that the district attorney had asked him to see Mr. Nunnemaker. At no time was Mr. Nunnemaker advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The psychiatrist proceeded to interview Mr. Nunnemaker regarding his marriage, the circumstances which led to the separation, his difficulties during the separation, and the circumstances that Mr. Nunnemaker recalled about the shooting. After collecting this information, the psychiatrist filed a five-page report with the district attorney.

An information charging Mr. Nunnemaker with murder and assault with a deadly weapon was filed in the Sonoma County Superior Court on August 21, 1975. At the jury trial, the prosecution in its rebuttal presented evidence of Mr. Nunnemaker's statements made during the interview with the prosecution psychiatrist. The jury found Mr. Nunnemaker guilty of murder in the first degree, but acquitted him on a separate assault charge.

On direct appeal to the California Court of Appeal, Mr. Nunnemaker raised federal constitutional challenges to the testimony of the prosecution psychiatrist. In affirming the conviction, the state appellate court avoided these challenges, holding that the failure to interpose a specific objection during trial precluded consideration on review. J.A. 15-18. The California Supreme Court denied Mr. Nunnemaker's petition for hearing on September 27, 1978. J.A. 26.

In 1985, Mr. Nunnemaker filed pro per petitions for habeas relief in the Sonoma County Superior Court and the state Court of Appeal. After these were denied, Mr. Nunnemaker filed an original petition for writ of habeas corpus in the California Supreme Court (Case No. Crim. 25449). J.A. 27-81. This petition was denied with citations to *In re Swain*, 34 Cal. 2d 300, 304 (1949), and *In re Waltreus*, 62 Cal. 2d 218, 255 (1965). J.A. 82.

Mr. Nunnemaker then filed a pro per petition for habeas relief in the United States District Court for the Northern District of California. This petition was dismissed without prejudice because it was not clear whether all state remedies had been exhausted. J.A. 83-87. A "Resubmission of Petition for Writ of Habeas Corpus" was filed by Mr. Nunnemaker in the federal district court on November 30, 1987. The petition was again denied without prejudice with a suggestion by the district court that Mr. Nunnemaker return to state court or that he abandon any unexhausted claims and refile the petition in the Federal Court. J.A. 88-91.

Mr. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court. J.A. 91-113.

On April 7, 1988, this petition was denied without citation or comment. J.A. 114.

After the California Supreme Court denied the petition, Mr. Nunnemaker filed another petition for habeas relief in the federal district court. An Order to Show Cause was issued on July 8, 1988. On December 9, 1988, this petition was denied. The federal district court found that the state procedural default invoked by the court of appeal on direct appeal barred review of the challenges to the prosecution's psychiatric testimony. J.A. 116-118.

On appeal, the Ninth Circuit, following the rule announced in *Harris v. Reed*, 489 U.S. 255 (1989), reversed the ruling of the district court. The Ninth Circuit held that when the California Supreme Court does not plainly state in its denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded. J.A. 128-149. On May 25, 1990, the Ninth Circuit denied rehearing and amended its opinion. J.A. 150.

A petition for certiorari was filed on July 9, 1990, and certiorari was granted November 5, 1990.

SUMMARY OF ARGUMENT

In *Harris v. Reed*, 489 U.S. 255 (1989), the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1988), was applied to federal habeas review of state court convictions under 28 U.S.C. § 2254. Under *Harris*, if the last state court rendering a judgment in the case clearly and expressly relies on a procedural default, federal habeas

review will be foreclosed, absent cause and prejudice or other exception. If, on the other hand, there is no clear and express reliance on procedural default, the federal habeas review must proceed. Where there is any ambiguity in this regard, that ambiguity must be resolved in favor of preserving the federal issue for habeas review. Applying the rationale and plain language of *Harris v. Reed*, 489 U.S. 255 (1989), the Ninth Circuit held in this case that because the California Supreme Court's minute order denial of Mr. Nunnemaker's original petition for habeas corpus relief contains no clear statement that its ruling rested on a state procedural bar, federal habeas review is not precluded.

All of the rationale in *Harris v. Reed* for applying the "plain statement" rule to habeas corpus cases apply here where the state court gives no reasons for its denial of an original petition requesting habeas relief, and the application of the rule poses no real additional burden on the state court. The California Supreme Court has in fact issued "plain statements" of its reliance on procedural default for over two decades. Both the California Supreme Court and the Ninth Circuit have recognized, without objection by the state attorney general, that a minute order denial of state habeas relief will be treated as a determination on the merits. This recognition is premised upon a correct understanding of California's discretionary procedural default rules, which permit a petitioner to cure a procedural defect in a successor petition and allow the state court to excuse defaults under some circumstances. Without justification, petitioner now proposes a whole new and different procedure for

dealing with minute order denials in the context of procedural default.

Applying the "plain statement" rule where no reasons are given by the state court for denial of an original petition for habeas corpus "burdens [the interests of finality, federalism, and comity] only minimally, if at all. The benefits, in contrast, are substantial." *Harris v. Reed*, 489 U.S. 255, 264 (1969). "[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " *Id.* at 264 n.12.

In *Harris v. Reed*, this Court has given the states an eminently clear and direct way to assert procedural default if it wishes to do so. The federal courts are not interfering with or restricting in any way the state court's reliance on procedural default. *Harris v. Reed* simply holds that if the state court relies on its own rules of procedural default, it should say so. The rationale of *Harris v. Reed*, applying the "plain statement" rule to habeas cases, should apply here where no reasons for denial of a state habeas petition was given. Federal review of Mr. Nunnemaker's federal constitutional issue should not be foreclosed.

ARGUMENT

I.

APPLYING THE "PLAIN STATEMENT" RULE HAS IMPOSED NO UNMANAGEABLE BURDEN ON THE CALIFORNIA SUPREME COURT

For twenty-one years The California Supreme Court has issued "plain statements" of its reliance on

procedural default. Petitioner's position represents a radical departure from the current law and practice of the California Supreme Court.

Since the Ninth Circuit's opinion in *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), the California Supreme Court has understood that its 21 year old practice of issuing a denial, without comment or citations, of an original habeas corpus petition would be treated by the federal courts as a determination on the merits. It has neither disputed nor chafed at this practice and has necessarily understood that if it wished to afford its citizens full review of federal constitutional claims in federal court, it could do so by issuing an unadorned denial.

In *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), the Ninth Circuit conducted a careful review of the California Supreme Court's practice of denying habeas corpus petitions without opinion. They noted that in California, the federal courts had difficulty in the past in determining whether the California Supreme Court's denial of a petition for habeas corpus was on procedural grounds or was on the merits. "The use by [the California Supreme Court] of the postcard denial has been at the root of the problem. As [the Ninth Circuit had] noted before, '[f]rom our standpoint, the failure of the California court to reveal the basis of its denial, whether substantive or procedural, is unfortunate.' " *Harris v. Superior Court*, 500 F.2d 1124, 1127 (9th Cir. 1974) (citing *Castro v. Klinger*, 373 F.2d 847 (9th Cir. 1967).

The California Supreme Court changed its practice, slightly revising the form of its postcard denials. The Ninth Circuit found that since 1969, the state supreme court has invariably noted on its denials of habeas corpus petitions the procedural grounds on which it refuses relief. *Id.* at 1127-28. The court concluded that there is "now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so." *Id.* at 1128. This rule has been applied consistently in the Ninth Circuit with the approval of the state. *See, e.g., McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986); *LaRue v. McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Kim v. Villalobos*, 799 F.2d 1317 (9th Cir. 1986).

In *McQuown v. McCarthy, supra*, the Ninth Circuit ruled that the failure to file an original petition in the California Supreme Court, even where a petition for review of a lower court denial of a habeas petition was filed and denied by the state high court, precluded federal habeas review because of a failure to exhaust state remedies. The Ninth Circuit and the California Attorney General agreed in that case. In its "Appellee's Response to Petition for Rehearing En Banc" (9th Cir. Case No. 84-6289), the California Attorney General argued that a summary denial of an original habeas corpus petition was a ruling on the merits:

> Next, appellee disagrees with appellant's argument this court's decision severely disrupts state appellate practice. The decision reached by this Court in the instant case leaves in tact (sic) *the general presumption a summary denial of a petition for habeas corpus by the California Supreme Court,*

without more, constitutes a ruling on the merits by that court. (Citations omitted; emphasis added)

Petitioner asks this Court to compare the decision in *Nunnemaker v. Ylst* with the decision in *McQuown v. McCartney*. Brief for Petitioner at 21. In fact, the cases are consistent in their analysis and application of state law.

Petitioner's position is, as his own statistics in his Petition for Rehearing and Suggestion for Rehearing En Banc filed in the Ninth Circuit show, inconsistent with the actual practice of the California Supreme Court. As petitioner noted, during the calendar year 1989, of the 898 original petitions for writs of habeas corpus which were denied, 550 were denied without explanation. The rest were denied with citations to one or more cases signalling procedural defect. The inescapable inference is, as the Attorney General conceded in *McQuown*, that the unadorned denials are not denials for reasons of procedural default. In other words, approximately 39% of the time the Court determined that it was appropriate to deny relief for reasons of procedural default; the remainder of the time a majority of the court deemed it appropriate to deny relief for reasons pertaining to the merits of a claim. Respondent's review of the Court's rulings in 1986 and 1988, the years in which respondent filed his two state habeas corpus petitions, is consistent with petitioner's own findings in that approximately 37% of the petitions denied in 1986 were denied for procedural reasons and 44% were so denied in 1988.

Petitioner now proposes that state law be interpreted differently. Interpreting the law of California one way for purposes of exhaustion and another way for purposes of procedural default does not promote consistency of law.

The application of a rule of law or the interpretation of law should not depend on the result or on who would ultimately benefit.

II.

THE DENIAL OF THE HABEAS CORPUS PETITION IS THE LAST STATE COURT JUDGMENT

Regardless of the fact that petitioner has argued in the past that a denial without comment or citation of an original habeas corpus petition is a decision on the merits, they now contend that such a denial is not a decision on the merits, arguing that the granting or denying of a habeas petition in the state court is purely discretionary. This argument is incorrect as a matter of state law.

A. State Habeas Corpus in California

Petitioner's position that a denial of an original habeas corpus petition should not be treated as a judgment on the merits (i.e., a denial for reasons other than procedural default) within the meaning of *Harris v. Reed* represents a fundamental misunderstanding of the habeas corpus remedy in California and the nature of a denial of an original petition for a writ of habeas corpus in four critical respects. First, the state supreme court, when confronted with a habeas corpus petition, must examine the bona fides of each petition before issuing a ruling, even if that ruling is simply a summary denial. Second, habeas corpus is the only method for bringing

facts outside the record to the Court's attention.[1] Third, for each potentially applicable procedural default in habeas corpus, there are numerous exceptions and, even when no exception applies, the state court may choose not to rely on such a default in denying relief. Fourth, a summary denial of a petition for review, unlike a pro forma order denying habeas corpus relief, may be issued without reviewing the merits of the claim.

These practices have the following critical implications and demonstrate the incorrectness of petitioner's position. First, a minute order denial of an original habeas corpus is a judgment under *Harris v. Reed* because it represents a review by the Court of the bona fides of the individual claims presented in a petition for their substantive and procedural sufficiency. Second, because of the great measure of discretion employed by the California Supreme Court in deciding whether to bar a petitioner's claim for reasons of procedural default and because facts outside the record may show that an earlier procedural default by a lower court was wrongly imposed, there is no basis to assert that a denial of an original habeas corpus, following a finding in an earlier

[1] In contrast to states like Arizona, California does not have an independent statutory "post-conviction" relief procedure. (*See* Amicus Brief of the States of Arizona, et al. at page 7, n.1.) In California, habeas corpus "may be used to challenge a judgment of conviction where the court was without jurisdiction or the proceedings were violative of the defendant's fundamental rights. Thus, habeas corpus, as a supplement to appeal and sometimes despite failure to appeal, has become a common method of post-conviction review of criminal proceedings." 6 Witkin & Epstein, *California Criminal Law*, § 3348, p. 452 (2d ed. 1989).

proceeding of procedural default, necessarily endorses that default.

1. Every Unlawfully Confined Citizen May Petition For Habeas Corpus Relief and the State Court Examines the Bona Fides of Each Individual Claim.

In California, every person unlawfully imprisoned or restrained has the right to prosecute a writ of habeas corpus "to inquire into the cause of such imprisonment or restraint" and every court in California, including the California Supreme Court, may exercise original jurisdiction over such writs. Cal. Pen. Code § 1473, subd. (a); Cal. Const., art. VI, § 10. This right to petition may only be suspended if required by public safety. Cal. Const., art. I., § 11.

The habeas corpus petitioner bears the burden of stating a prima facie case for relief and of pleading his compliance with procedural matters as well. *People v. Bower*, 38 Cal. 3d 865, 872 (1985) (petitioner must explain any delay in making claim and plead facts which if true, justify relief); *In re Lawler*, 23 Cal. 3d 190, 194 (1979) (facts must be sufficient to justify relief); *see also* Cal. Pen. Code § 1475 (petitioner must state whether prior habeas corpus applications have been made and provide results). When the facts, if true, would entitle petitioner to relief, the court must issue an order to show cause. *In re Lawler*, 23 Cal. 3d at 194; see also *In re Hochberg*, 2 Cal. 3d 870, 875 n.4 (1970).[2] Conversely, any petition that does not meet

[2] Once an order to show cause issues, the matter becomes a "cause" within the meaning of the California Constitution (article VI, § 14), and the court must issue a written opinion. *People v. Pacini*, 120 Cal. App. 3d 877, 884 (1981).

these standards must be summarily denied. *People v. Gonzales*, 51 Cal. 3d 1179, 1258 (1990). An examination of the merits of the substantive claim includes the question of whether the error, if it occurred, was prejudicial. *See id.* at 1241-42 (declining to issue an order to show cause on issues of prosecutorial misconduct and ineffective assistance of counsel for failure to disclose/use available impeachment evidence because any error was clearly harmless).

As the foregoing demonstrates, before the California Supreme Court (or any lower court) may deny a habeas corpus petition, it must examine the pleading to determine whether the substantive issues are cognizable in habeas corpus, whether the petition states a prima facie case for relief, and whether petitioner has cleared potential procedural hurdles. Thus, the California Supreme Court must examine the substantive issues and their merits which are presented in original habeas corpus writs before issuing even a minute order pro forma denial. This feature of state habeas corpus law distinguishes minute order denials following original habeas petitions from minute order denials of petitions for review in California and distinguishes California's procedures from those employed in many of the cases from other circuits cited by petitioner.

2. Habeas Corpus as an Exclusive Remedy.

Petitioner also fails to note that "[i]t is . . . well-established . . . that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right, resort to

habeas corpus is not only appropriate but required." *In re Bower*, 38 Cal. 3d 865, 872 (1985); see also *In re Lewallen*, 23 Cal. 3d 274, 278 (1979); *People v. Westmoreland*, 58 Cal. App. 3d 32, 36 (1976). Thus, for example, a habeas corpus petitioner may have been denied relief on direct appeal because no objection appeared in the trial record. He may then file a habeas corpus petition, referring to facts outside the appellate transcript, which show that an objection was made in chambers, or that he was deemed to have a continuing objection to a certain line of questioning, or to show that the action was taken ex parte without his presence or knowledge.

Under such circumstances, if the California Supreme Court recognized that the claim had not in fact been defaulted but it nonetheless wished to deny the petition, it would reject it on its merits, and signal that rejection by issuing a minute order denial. Under petitioner's position, however, such a denial would be treated as a nullity at best or, at worst, as a reaffirmation of the earlier statement by the lower court of procedural default. By ignoring this use of habeas corpus – to present facts which were not part of the appellate record – petitioner propounds a rule whereby an earlier, factually inaccurate ruling rejecting a constitutional issue for failure to comply with a state rule of procedure, could never be overcome, despite the existence of facts to excuse the default unless the California Supreme Court issued an order to show cause and wrote an opinion. As discussed more fully below, this is but one of the ways in which adopting petitioner's rule will make more, not less work for the state court.

B. Summary Denials of Petitions for Review Distinguished

Arguing by analogy to cases defining a "judgment" for purposes of this Court's certiorari jurisdiction under 28 U.S.C. § 1257, petitioner contends that an order by the state court summarily denying an original petition for a writ of habeas corpus is not a judgment within the meaning of *Harris v. Reed*. In so arguing, petitioner confuses a petition for review of a lower court decision and an original petition for a writ of habeas corpus.

There is some authority for the proposition that *Harris's* reference to "the last state court judgment in the case" should be understood to refer to the state court whose judgment would be subject to review on petition for writ of certiorari. *See, e.g., Goodwin v. Collins*, 910 F.2d 185, 187 (5th Cir. 1990); *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990). However, as far as respondent is aware, there has never been any suggestion that a writ of certiorari does not run to the California Supreme Court's minute order denial of an original writ of habeas corpus. Only a few months ago, two members of this Court voted to grant certiorari from such an order of the California Supreme Court. *See Robertson v. California*, ___ U.S. ___, 111 S. Ct. 568 (Marshall, J. and Blackmun, J., dissenting from denial of petition for writ of certiorari).[3]

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[3] The California Attorney General's brief in opposition to the petition of certiorari in that case contained no argument that certiorari did not lie with respect to the California Supreme Court's "silent" denial of Robertson's original habeas petition. *See Robertson v. California*, No. 90-5774, Opposition to Petition for Writ of Certiorari.

It is true that when the highest state court, in the exercise of discretion, declines to review the decision of an intermediate appellate court decision, certiorari runs to an intermediate court's decision, not to the highest state court. *Sullivan v. Texas*, 207 U.S. 416 (1908); *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1952). However, petitioner's analogy to discretionary review on appeal is simply inapt. Original petitions for a writ of habeas corpus in the California Supreme Court cannot be compared to petitions for review in the state supreme court or petitions for certiorari in this Court. When a criminal defendant loses his case on direct appeal in the intermediate appellate court he may petition the California Supreme Court for review. He may also petition for review following a denial of habeas corpus relief by the lower courts. Petitions for review are governed by Rules 28 and 29.[4]

Under Rule 29, "Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important question of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges." The first category is the one most commonly relied upon by litigants

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[4] Prior to May 5, 1985, such petitions were called petitions for hearing. In May, 1985, changes were made in the process which resulted in a change in terminology. The changes that were made do not alter the discussion set forth above concerning the grounds for granting review or hearing.

and is analogous to this Court's Rule 10.1. None of these categories involves an examination of the individual merits of a litigant's claim and indeed, review can be granted or denied without any inspection of the petition's merits. Put differently, a judge may decline to vote to accept review, although he believes petitioner has been grievously wronged, simply because the issue is not an important question of law or the legal principles are not ones on which the lower courts are divided. In so doing, the judge would be acting within and consistent with the governing law and could, under the law, vote to deny the petition without pausing to consider the merits of the substantive claim presented. *See People v. Triggs*, 8 Cal. 3d 884, 891 (1973) ("The significance of such refusal [to grant review] is not greater than this – that this court does not consider that the interests of justice, or the purposes for which the power [to grant a hearing] was given, require its exercise in the particular case." [citations omitted]). In such a situation it is clear that a denial is not any expression by the Court of its view of the bona fides of an issue but simply an indication that the matter is not worthy of the court's attention and does not fit within the Rule 29 criteria.

There is no comparable rule governing the disposition of original writs of habeas corpus. There is no rule which permits the Court to decline to afford relief or to decline to issue an order to show cause if the issue has merit and petitioner is entitled to relief if the facts alleged are proven. In fact, the rules are precisely the converse. In order to decide whether, under the law, to issue an order to show cause and ultimately grant relief or whether to deny the petition, the Court must examine the bona fides

(substantive and procedural) of the individual claim presented. *People v. Gonzales*, 51 Cal. 3d 1179, 1258 (1990).

As the foregoing demonstrates, before the California Supreme Court (or any lower court) may deny a habeas corpus petition, it must examine the pleading to determine whether the substantive issues are cognizable in habeas corpus, whether the petition states a prima facie case for relief, and whether petitioner has cleared potential procedural hurdles. There is nothing in this statutory framework that vests the California Supreme Court, or any other California court for that matter, with discretion to decline to entertain an original habeas petition.

C. Federal Habeas Corpus

Petitioner's alternative analogy to this Court's original habeas corpus jurisdiction is similarly inapt. Unlike the original habeas jurisdiction of the California Supreme Court, this Court's original habeas jurisdiction *is* discretionary. Such discretion is conferred by both statute and rule. *See* 28 U.S.C. § 2242; S. Ct. R. 20.4(a). There is no similar provision in California law.

The simple fact is that the California habeas scheme does not vest an appellate court with discretion to decline to entertain an original habeas petition. Thus, to the extent that there is an analogy between habeas proceedings in the California Supreme Court and habeas proceeding in federal courts, the analogy is to proceedings in the federal *district* courts. Unlike federal appellate courts, the federal district courts have no discretion to refuse to entertain a habeas proceeding. *See Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990) (issuing writ of mandamus

compelling district court to determine petition). The discretion of the federal district courts is limited to the decision whether to issue the writ, not whether to entertain the application; a writ of habeas corpus is a writ of right once reasonable cause is shown. *Barrett v. Hunter*, 180 F.2d 510 (10th Cir.), *cert. denied*, 340 U.S. 897 (1950).

Thus, it is hardly surprising that not one of the repeated, emphatic assertions by petitioner and amici that the California original writ of habeas corpus is a ~~discreti~~onary writ is accompanied by authority supporting that assertion.[5] Although California caselaw is replete

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[5] The authority cited by petitioner (Petitioner's Brief at 30) is either irrelevant to the question presented or supportive of respondent's position. The discretionary policy of law of the case, like the state law definition of a "cause," are implicated only where a reviewing court issues a written opinion. *People v. Medina*, 6 Cal. 3d 484, 491 n.7 (1972); *People v. Pacini*, 120 Cal. App. 3d 877, 882-883 (1981); *Myers v. Ylst*, 897 F.2d 417, 423 n.7 (9th Cir. 1990); *LaRue v. McCarthy*, 833 F.2d 140, 143 n.2 (9th Cir. 1987). Thus, it is hardly surprising that these principles are not implicated when the court denies an original petition without citation or comment.

The Supreme Court's description of its practices and procedures, prepared for laypeople and "distributed to the public and the press," Supreme Court of California Practices and Procedures at V, does not purport to, and cannot, supplant the decisional law of the state. *People v. Connor*, 270 Cal. App.2d 630, 638 n.2 (1969), also cited by petitioner, confirms that habeas corpus in California is a " . . . 'writ of right' " whose "issuance" is discretionary. Of course, as respondent has demonstrated – and as *People v. Connor* confirms – the proper exercise of that discretion requires the court first to examine the bona fides of the claims presented in order to determine whether a prima facie entitlement to relief has been made.

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with discussion of a multitude of procedural reasons for refusing to issue the writ of habeas corpus, *see, e.g., In re Swain*, 34 Cal. 2d 300, 304 (1949) (facts not stated fully and frankly; delay in raising claim not satisfactorily explained); *In re Miller*, 17 Cal. 2d 734 (1941) (court will not entertain successive petitions making same claim absent change in facts or applicable law); *In re Waltreus*, 62 Cal. 2d 218, 225 (1965) (habeas corpus not a second appeal); *In re Dixon*, 41 Cal. 2d 756, 759 (1953) (habeas not substitute for appeal), discretion to decline review has never been cited as a reason in any California case. Standing in marked contrast is the number of cases discussing the discretionary nature of the federal original writ of habeas corpus. *See. e.g., Ex Parte Hudgings*, 249 U.S. 378 (1919); *Chaapel v. Cochran*, 369 U.S. 869 (1962); *Hayes v. Maryland*, 370 U.S. 931 (1962).

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Even petitioner's reliance on the dissent in *Myers v. Ylst* must fail, for the dissent recognized that minute order denials are denials on the merits "in the sense that they fail to indicate that the supreme court denied state habeas on the basis of procedural default." 897 F.2d at 427 n.1.

Amicus's assertion that the *"Michael E.* rule" supports its position, Brief Amicus Curiae of the Criminal Justice Legal Foundation at 16, is also misplaced. In *In re Michael E.*, 15 Cal. 3d 183, 193 n.15 (1975), the court simply disapproved, for practical reasons, the filing of an original petition in the supreme court where the Court of Appeal had decided the same issue in a published written opinion, and petitioner had the alternative of filing a petition for hearing. In a later case, the court granted an original writ where, as in this case, the writ had been denied without comment by the Court of Appeal. *In re Catalano*, 29 Cal. 3d 1, 7 (1981).

D. Despite the Superficial Appearance of Conflict, the Ninth Circuit's Decision Is Consistent With Other Circuit Court Decisions Involving "Pro Forma" Orders

Once the unique aspects of California habeas procedure are understood, the error of petitioner's assertion that the decision below is in conflict with the decision of other circuits becomes readily apparent.

Petitioner asserts that the opinion of the Fifth Circuit in its opinion in *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989), is in conflict with the decision below. However, the State of Texas has stated that the Ninth Circuit's ruling in *Nunnemaker v. Ylst* is fully consistent with Fifth Circuit authority and *Harris v. Reed*. *See Russell v. Collins*, No. 89-7679, Respondent's Opposition to Petition for Certiorari, p. 22. Furthermore, in *Edwards v. Butler*, 882 F.2d 160 (5th Cir. 1989), the Fifth Circuit, fully consistent with *Nunnemaker v. Ylst*, found that an unwritten state court order cannot create a procedural bar under *Harris v. Reed*. *See also Booker v. Lynaugh*, 872 F.2d 100 (5th Cir. 1980).

Contrary to petitioner's assertion none of the federal circuits has relied on 28 U.S.C. § 1257 or the cases construing that section to interpret a minute order denial by a state court of an original petition for habeas relief. Each of the cases[6] cited by petitioner dealt with a state court's denial of review of a lower court decision.

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[6] *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990); *Felton v. Barnett*, 912 F.2d 92 (4th Cir. 1990); *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990); *Harman v. Barton*, 894 F.2d 1268 (11th Cir. 1990); *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce v. Smith*, 889 F.2d 1271 (2d Cir. 1989); *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989); *Ellis v. Lynaugh*, 873 F.2d 830 (5th Cir. 1989).

Petitioner has in the past recognized the distinction between a petition for review and an original habeas petition.[7] In *McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986), the state argued that the claimant had not exhausted state remedies in that he had not filed an original habeas petition with the California Supreme Court. The Ninth Circuit there held that "denial of a hearing of a court of appeal decision may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in the opinion." *Id.* at 810. This decision was based on the rules of appeal in California which held that a denial may mean no more than that a ground which the court deems adequate for ordering a hearing has not been brought to its attention.

Petitioner argues that applying the Ninth Circuit's distinction of the state court's exercise of its original

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[7] In their briefing in *McQuown v. McCartney*, the state attorney general stated:

> The scope of the California Supreme Court's review is directly related to the mechanism by which the lower court's action is brought to its attention: while the filing of an original petition for writ of habeas corpus in the Supreme Court would allow that court to consider all of the raised issues pursuant to its authority under California Constitution, article VI, § 10 (original jurisdiction), it cannot be said the filing of a petition for hearing with that court necessarily results in a similar conclusion.

"Appellee's Response to Petition for Hearing En Banc" (9th Cir. Case No. 84-6289).

versus appellate jurisdiction to the facts in *Harris v. Reed*, this Court would have found "the failure of the Illinois Court to provide a plain statement would have been legally inconsequential." Petitioner's Brief at 21. This argument misconstrues the decision of the Ninth Circuit. They did not state that no decisions rendered in the course of the California Supreme Court's appellate function are judgments under *Harris v. Reed*. The Ninth Circuit stated only that a summary denial of a petition for review of a lower court decision is not a decision on the merits.

III.

ONE CANNOT CONCLUDE THAT A DENIAL OF RELIEF ON DIRECT APPEAL FOR PROCEDURAL REASONS WILL NECESSARILY PRODUCE THE SAME RESULT IN ORIGINAL HABEAS CORPUS WRIT PROCEEDINGS

The most common procedural bases for denials of habeas corpus petitions in California are: (1) the matter was raised and rejected on direct appeal[8]; (2) the matter could have been but was not raised on direct appeal[9]; (3) the identical issue was raised in a prior habeas corpus petition and neither additional facts were presented nor new law exists[10]; (4) a delay in raising the claim was not explained[11]; (5) the facts in the petition are not stated

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[8] Usually signalled in a minute order denial by a citation to *In re Waltreus*, 62 Cal. 2d 218, 225 (1965).

[9] Usually signalled by a citation to *In re Dixon*, 41 Cal. 2d 756, 759 (1953).

[10] Usually signalled by a citation to *In re Miller*, 17 Cal. 2d 734, 735 (1941).

[11] Usually signalled by a citation to *In re Swain*, 34 Cal. 2d 300, 304 (1949) or *In re Stankewitz*, 40 Cal. 3d 391, 397 n.1 (1985).

with sufficient particularity[12]; and (6) the issue is not cognizable on habeas corpus.[13] Yet for each of these policies or rules there are numerous exceptions in which the rule or general policy will not be applied and cases in which the rule has not been applied although no exception is applicable. Two examples graphically illustrate respondent's point.

Example 1: With respect to the rule against successive habeas corpus petitions absent new facts or a change in the law,[14] the California Supreme Court has noted:

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[12] Usually signalled by a citation to *In re Swain, supra.*

[13] The case used to signal this problem, which in some circumstances is analogous to procedural default in that relief is denied for independent reasons of state law, apart from the claim's merits, will vary depending upon the issue raised. For example, in denying a petition which challenges the sufficiency of the evidence, the Court will typically cite *In re Lindley*, 29 Cal. 2d 709, 723 (1947) (sufficiency of evidence not cognizable on habeas corpus). In denying a petition challenging the legality of a search and seizure, the Court will typically cite *In re Sterling*, 63 Cal. 2d 486, 487 (1965) (search and seizure claims are not cognizable on habeas corpus).

[14] Although this rule is frequently stated as a prohibition against successive habeas corpus petitions, the correct statement of the rule is that a petition for habeas corpus based on the same grounds as those of a previously denied petition will be denied absent a change in the law or the presentation of new facts which substantially affect petitioner's rights. *See, e.g., In re Martin*, 44 Cal. 3d 1, 27 n.3 (1987), in which the California Supreme Court granted habeas corpus relief on a second habeas corpus petition and after affirmance on appeal because "new facts [were] alleged in the petition and supported by exhibits of recent date." *Id.*

"Our policy is to deny a new application unless there has been a change in the facts or law [cites], but this policy is discretionary. [cites]." *In re Bevill*, 68 Cal. 2d 854, 863 n.9 (1968). In *Bevill*, the court had denied an earlier habeas corpus petition in 1967, but issued an order to show cause and ultimately granted relief slightly over a year later.

Consequently, one cannot, contrary to petitioner's position, assume with confidence that a second habeas corpus petition will be automatically denied as an inappropriate successor or that a denial of a second habeas corpus petition, following an earlier one denied for reasons of state law or procedural default, is based on the same state law or procedural reasons. This is particularly true where the first habeas corpus petition was denied for an independent state reason or violation of state procedural rule which could be remedied by the filing of the second habeas corpus petition. In fact, a "silent" minute order denial following an earlier denial for specified reasons of default suggests quite the opposite, i.e., that upon reexamination the Court wishes now to forgive the earlier default either because petitioner has corrected the problem or because upon reexamination the failure to reach the merits was misguided.

Example 2: Although the general rule is that habeas corpus may not be used as a second appeal (i.e., where the issue was raised and rejected on appeal), that rule may be overlooked "where 'special circumstances' are deemed to exist", *In re Coughlin*, 16 Cal. 3d 52, 55 (1976), or where denials of the right to counsel are involved because these issues are cognizable on habeas corpus whether or not they are raised on appeal, *In re Hochberg*, 2 Cal. 3d 870, 875 (1970), or where the sentence imposed

upon defendant exceeded the authorized maximum, *In re Huffman*, 42 Cal. 3d 552, 555 (1986), or where intervening law justified relief, *In re Hill & Saunders*, 71 Cal. 2d 997 (1969).

In respondent's case, for example, the California Supreme Court denied respondent's earlier petition with a citation to *In re Swain*, which often is meant to indicate that petitioner did not explain any delay in presenting the claim. Respondent, in his renewed state habeas corpus petition, explained the reason for his delay. J.A. 95. Properly understood in this light, the Court's decision to remove the citation to *In re Swain* is not only comprehensible but is both logical and fatally damages petitioner's position that once a procedural bar exists it will invariably not be forgiven. Similarly, the earlier denial contained a citation to *In re Waltreus*, which often indicates the issue was already presented on direct appeal. However, in the second petition, respondent expressly pointed out to the Court that he was relying on case law decided after his appeal (i.e., new law). Accordingly, the removal of the *In re Waltreus* citation is similarly understandable.

IV.

APPLYING THE "PLAIN STATEMENT" RULE TO MINUTE ORDER DENIALS OF STATE HABEAS CORPUS IS CONSISTENT WITH THE RATIONALE BEHIND *HARRIS v. REED*

A. *Harris v. Reed* Applies to Pro Forma Denials

Petitioner argues that the rule of *Harris v. Reed* does not apply to a minute order denial of state habeas relief where a procedural default was found in an opinion from

a prior proceeding, arguing that only state "opinions" are "judgments" within the meaning of *Harris v. Reed*. This argument should be rejected.

Harris v. Reed and its predecessors instruct that the mere existence of a basis for a state procedural bar is not talismatic. If that were otherwise there would have been no need for this Court to decide *Harris v. Reed, supra,* and *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

Furthermore, the *Harris* opinion makes clear that this Court intended its ruling to apply not only to state-court opinions, but also to state-court pro forma orders. In *Harris v. Reed,* 489 U.S. at 265 n. 12, this Court stated:

> [A] state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default." Of course, if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas corpus court's refusing to consider the merits of the federal claim.

Thus, this Court's decision clearly mandated the Ninth Circuit's holding below that the California Supreme Court's failure to state that relief was denied on procedural grounds in the minute order denial requires federal review of the merits of the claim.

B. There Can Be No Presumption That a Minute Order Denial of an Original Habeas Petition Relates Back to Another Court Proceeding

Petitioner suggests that even if the California Supreme Court's silent denial of an original habeas

petition were otherwise an ambiguous judgment within the meaning of *Harris v. Reed,* in the procedural context of this case there is no ambiguity. After all, petitioner argues, the state court opinion on direct appeal applied an unambiguous procedural default, and the state supreme court's pro forma denial of respondent's first original habeas petition included citations to *Waltreus* and *Swain*. Petitioner cites no authority for the proposition that a minute order denial of an original state habeas petition relates to any other court proceedings. More importantly, petitioner's position is not actually that the silent denial is unambiguous; it is simply a suggestion of the manner in which the ambiguity can be resolved. For petitioner to state the premise is to fly directly in the face of *Harris v. Reed.*

In *Harris v. Reed,* this Court expressly declined to adopt a presumption that a state court's judgment rests on procedural grounds and rejected the assertion that the federal court should look back to prior court proceedings to assess the state court's intention to the extent that this is possible. *Harris v. Reed* and *Michigan v. Long* constitute component parts of a body of jurisprudence designed both to reduce the intrusiveness of federal review of claims originating in the state courts and to lessen the burden placed on federal courts. *See Michigan v. Long,* 463 U.S. 1032, 1040 (1983). Adopting petitioner's proposed rule would frustrate *Harris v. Reed,* if not contradict it, by returning the federal courts to second-guessing the state court's determinations of state law.[15]

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[15] In *Harris v. Reed,* Justice O'Connor, in a concurring opinion, stated that federal courts may properly inquire into

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The issue of state procedural default cannot be raised in the first instance in federal court. *Ulster County Court v. Allen*, 442 U.S. 140 (1979). This is a determination that must be made by the state courts. Thus, it is reasonable to require the state court to plainly state its intention to impose a procedural default.

Applying the "plain statement" rule does not foreclose a state court from relying on a state procedural bar. Where a claim has been presented to the state court in a habeas petition, it is not unreasonable to require the state court to be explicit if, when it denied the petition, it intended to rely upon a procedural default. Requiring a state that wishes to rely on a procedural bar rule to say so does not interfere unduly with state judicial decisionmaking. A state court that wishes to rely on a procedural bar

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the availability of state remedies in determining whether claims presented in a petition for habeas corpus have been properly exhausted in the state courts. *Harris v. Reed*, 489 U.S. 255, 269 (1989). A discussion as to the interests served by the exhaustion rule followed. Justice O'Connor concluded:

> To protect these interests we have held that where a federal habeas petitioner raises a claim which has *never* been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).

Id. (emphasis in the original).

In the situation now before this Court, the question of available remedies in the state courts is not at issue. Furthermore, this Court is not presented with the situation where the state court was never given an opportunity to address the issue.

rule in a one-line pro forma order easily can write "denied – procedural default." *See Harris v. Reed*, 489 U.S. at 265 n.12.

Petitioner's proposal would require the federal courts in the large number of cases coming to them following a silent denial of an original state habeas corpus petition to examine the state law and record to determine whether a state procedural bar was applicable and was in fact applied. Such a task is actually more formidable in the context of a silent denial that an ambiguous opinion. An ambiguous opinion provides at least some insight into the state court's reasons for denying relief. A pro forma denial leaves the federal courts without any guidance as to the basis of the state court's decision. The problem of determining whether a potential procedural bar was applied or waived, if not left to guesswork, may escalate to unmanageable proportions. In the context of California habeas law, as discussed earlier, this is so even where there has been reliance on procedural default in an earlier proceeding.

The purpose of the *Harris v. Reed* rule is to provide for an appropriate distribution of the burden of determining procedural default between state and federal courts. It would be ironic indeed to suggest that the state courts could refuse to assume any of the burden and legitimately shift it entirely to the federal courts by the simple expedient of failing to discuss the issue. Just as in *Harris* this Court found it consistent with the principles of comity to address the merits of a federal claim when the last state court to render a judgment in the case has not clearly discussed a procedural bar, this Court should hold that the same is true when the last state court to render a

judgment in the case has not discussed the procedural bar at all.

V.

APPLYING *HARRIS v. REED* TO MINUTE ORDER DENIALS BURDENS STATE INTERESTS ONLY MINIMALLY, IF AT ALL, AND THE BENEFITS ARE SUBSTANTIAL

Petitioner's position that the Ninth Circuit's decision encourages a "war of attrition" or is a trap for the state courts is unrealistic, at least under California law. In California, a habeas corpus petitioner is required to set forth the direct appeal history of the case *and* to state whether any prior habeas corpus petitions have been filed and what the results were of the earlier petitions, Cal. Penal Code § 1475.[16] These rules requiring full

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[16] Petitioner warns that unless his position is adopted a reasoned opinion of the California Supreme Court denying relief for reasons of procedural default could be swept away by a state trial court issuing a denial of habeas relief, which minute order is subsequently casually endorsed by the California Supreme Court. He also suggests that if the trial court imposed a procedural bar the California Supreme Court could inadvertently transform it into a decision on the merits by issuing a minute order denial. Petitioner's position rests on an assumption that the reasons for the prior rulings will be hidden from the California Supreme Court, that its orders in habeas corpus actions are not the product of careful study by the court staff, and that the California Supreme Court would not deem it appropriate to remove a previously imposed procedural bar.

As noted above, each one of these assumptions is untrue. When an original habeas corpus petition is before the Court, it is aware of the prior direct appeal history and prior habeas corpus history. Thus, it would be difficult to conceal a prior procedural default from the Court.

procedural disclosure exist for a simple reason – to allow the Court to obtain and review the earlier pleadings, orders, and internal memoranda written by court staff in order to determine what action should be taken on the current request. Notably, in this case respondent fully apprised the California Supreme Court of the history of the case.

Petitioner suggests that somehow Mr. Nunnemaker created a problem with successive petitions in the courts. This argument ignores first that Mr. Nunnemaker filed a second petition in the state court only because he was directed to do so by the federal district court. Secondly, this argument ignores the fact that California prisoners are entitled by state law to file original petitions for habeas relief in the superior, appellate, and state high courts. If this is in fact too burdensome on the state courts, the state has the power to remedy the situation. It can pass legislation amending this procedure.

In any event, adopting petitioner's proposal will not cure the problem of prisoners filing successive state petitions for habeas relief if that problem does in fact exist. The vast majority of habeas petitions in both the state courts and federal courts are filed in propria persona. Not applying the plain statement rule will not limit the habeas petitions which are filed. However, applying the plain statement requirement may well lessen the work required by all courts.

There are three options for dealing with silent denials of state habeas petitions: (1) the federal court can send the case back to the state court for clarification of its decision; (2) the federal court can presume procedural default and dismiss the habeas petition; or (3) the plain statement rule can be applied. This Court has recognized

that the practice of vacation and continuance for clarification is unsatisfactory both because of the delay and decrease in efficiency of judicial administration. *Michigan v. Long*, 463 U.S. at 1039. Also, in *Michigan v. Long*, this Court declined to dismiss the case or require the state court to reconsider its decision solely because of a possibility that an adequate and independent state ground supported the judgment. Rather, this Court found that it had jurisdiction in the absence of a plain statement that the decision in the state court rested on adequate and independent state ground.

Furthermore, a presumption that the state court relied on a procedural default found in an earlier proceeding, when it summarily denied the habeas petition, may in fact be wrong. As noted *supra*, procedural defaults are sometimes forgiven by the state court, and a decision on the merits is made. It should also be noted, as petitioner has also put forth, that in denying an original petition for habeas relief, the justices of the California Supreme Court need not agree on the reasons for such denial.[17] If a habeas petition is denied without a

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[17] However, petitioner's implication that a minute order denial cannot be considered a denial on the merits because each judge could have a different reason for his or her vote must be firmly rejected as wrong. Any order issued on a petition for review or an original writ must garner consent by a majority of the justices. Thus, if four justices wished to deny an original habeas corpus petition for reasons of procedural default, an order so stating (i.e., citing procedural authority) would be the order issued by the court. If a judge wished to publicly indicate his disagreement (i.e., in effect if he wished to publicly dissent), he could so state. Recently, for example, in *In*

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consensus that there is a procedural default, a presumption that a summary denial was based on a procedural default would clearly be wrong.

Petitioner ignores that the state court is the controlling entity in this situation. It has control over the content of the decision denying a petition for habeas relief. By providing a plain statement, the state court will determine whether federal habeas review is proper.

When the Court is dealing with individual liberty, ambiguity should not be tolerated. The jurisdiction of this Court on habeas review is broader than on direct review. *Fay v. Noia*, 372 U.S. 391 (1963). "[I]n considering petitions for relief under 28 U.S.C. § 2254, the federal courts do not review state court decisions to determine if the states have gone too far in protecting the rights of their citizenry, but rather perform the core function of vindicating federally protected rights." *Harris v. Reed*. 489 U.S. 255, 267 (1989) (Stevens, J., concurring).

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re Moore, S0016650 (filed Nov. 14, 1990), one California Supreme Court justice dissented from the minute order denial of an original habeas corpus petition, registering his opinion that an order to show cause should issue. Conversely, a minute order denial without any citation cannot be issued unless a majority of the justices endorse that order. Consequently, a denial without any citation of authority is not indecipherable in the sense that it could rest on reasons of procedural default. Had a majority of the court wished to deny a petition for reasons of default, it would have.

CONCLUSION

The *Harris v. Reed* approach provides state judges with a clear opportunity to develop state jurisprudence unimpeded by federal interference and will also preserve the integrity of federal law. *See Michigan v. Long*, 463 U.S. at 1042. There is no reason to depart from the "plain statement" rule of *Michigan v. Long*, *Caldwell v. Mississippi*, and *Harris v. Reed*.

– The plain language and history behind *Harris v. Reed* compel a conclusion that the federal court is not foreclosed from reaching the merits of respondent's case. Quite simply, the last state court rendering a judgment in this case did so with a minute order denial of the original petition for habeas relief. Such denial cannot and does not constitute a clear and express statement that the state court based its denial on a procedural bar. Absent such a clear and express statement, the federal court must proceed to the merits of the claim.

For the reasons expressed herein, it is respectfully submitted that the decision of the Ninth Circuit be affirmed.

Respectfully submitted,

JULIANA DROUS
(Appointed by this Court)
214 Duboce Avenue
San Francisco, CA 94103
(415) 863-3580

Attorney for Respondent